STATEMENT OF THE CASE

This case of first impression presents an opportunity for the Court to resolve two separate conflicts regarding a court's moral and legal obligation, consistent with due process principles and constitutional rights, to: (1) protect the right to trial by a fair, impartial and competent jury where the judge is delivered a handwritten note from the jury foreperson almost immediately after deliberations commence, stating that one of the jurors cannot understand English and requires a translator, thus providing uncontroverted evidence of juror incompetence and/or misconduct; and (2) allow the introduction of relevant, admissible and material evidence at trial, offered in defense of the employer's proffered "non-discriminatory" basis for the termination. The evidence was not given any weight, but if viewed in the totality of circumstances it would have established that the nature of the workplace was hostile, in support of Petitioner's claim of pretextual termination under FEHA.

Petitioner, Vaughn H. Bruenn (hereinafter "Bruenn"), initiated the lawsuit on August 29, 2002 in the Superior Court of the State of California against his former employer, Northrop Grumman Corporation (hereinafter "Northrop"), following his February 15, 2002 termination. Bruenn submits that his termination was pretextual and that he was subjected to a discriminatory and hostile work environment based on his membership in a protected class [employee with medical disability on medical leave who is perceived by co-workers to be suffering from Acquired Immunodeficiency Syndrome ("AIDS") or other highly contagious disease], rather than on poor work performance as alleged by Northrop.

Prior to trial on July 28, 2003, Northrop brought its Motion *in Limine* No. 2 to exclude evidence of a "stray remark" made by Mr. McClain, a decision-making manager to Bruenn's co-worker, Ms. Patty Jackson. The trial court granted the motion to exclude the "don't ask, don't tell" statement, which was made in a mocking manner upon Petitioner's return to work from a five-month medical leave, apparently under the mistaken belief that Petitioner was suffering from AIDS, though in reality he had been diagnosed with depression and chronic hepatitis C.[5] The excluded "don't ask, don't tell" statement related to the military policies of the Clinton Administration relative to homosexuality and to further infer, in context of the medical leave discussion, that Bruenn's supervisors and co-workers believed Bruenn to be a homosexual afflicted with AIDS.

The granting of the Motion *in Limine* No. 2 prevented the jury from hearing relevant, admissible evidence on the issue of "pretext" under FEHA. The so-called "stray remark" was relevant and admissible evidence under Cal. Evid. Code § 351 for purposes of rebutting the employer's alleged non-discriminatory reason for terminating Petitioner. The evidence explains why Petitioner's co-workers were shunning and avoiding him, and why his performance at work had had come under attack. The Trial commenced on October 6, 2003. At trial, Bruenn proceeded only with the

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[5] Hepatitis C is a liver disease caused by infection with the hepatitis C virus (HCV). The virus causes liver inflammation, which interferes with proper liver function. Hepatitis C can eventually lead to severe, permanent liver damage and cirrhosis, and may be complicated by liver cancer. Because the initial symptoms are mild, hepatitis C often goes unnoticed until years later when liver damage is discovered. Treatment for hepatitis C involves a 24- or 48-week regimen of the combination of pegylated alpha interferon (Interferon A) and ribavirin.

first cause of action for medical disability discrimination pursuant to FEHA. On October 17, 2003 the matter was submitted to the jury.

Within an hour of jury deliberations, the trial court judge received a note from the jury foreperson indicating that one of the jurors was having trouble speaking English. The offending juror had difficulty participating in deliberations and had requested a translator, which the court swiftly denied. (App. 26a).

The jury foreman further expressed the concern of all of the jurors that this issue was jeopardizing the deliberation process. The court's response was short and curt: "The Court has no ability to provide a translator. It is too early to determine that proper deliberations can't take place. Perhaps jury should recess and come back fresh on Monday." There is no evidence that the trial court advised counsel of the October 17, 2003 note from the jury. Deliberations proceeded on Monday as scheduled, and the jury rendered its verdict for the Respondents. The decision was appealed through the California Supreme Court on the two issues of: (1) failure of the trial court to investigate juror incompetence and (2) improper exclusion of evidence offered to rebut employer's alleged "non-discriminatory" reason for termination.

The injection of translators into the deliberation process may open a Pandora's Box to legal and moral obligations that courts may not be ready for, but the issue is ripe for review by this Court. Currently, there is no uniform standard as to whether courts should permit translators in the deliberation room. The idea has its origins in a Las Cruces, New Mexico criminal courtroom in Doña Ana County, in December 1999,

where a trial judge permitted a Spanish translator into the deliberation room. Translators could provide much-needed logistical support in regions of the United States heavily represented by ethnic groups. In the Southwest and a growing number of states along the east coast, for example, where many diverse ethnic groups co-exist and whose members speak limited English, the foreseeable benefits of providing translators in the deliberation room may outweigh the burdens.

A. The California Superior Court Proceeding

On August 29, 2002 Bruenn filed a complaint against his former employer with the Superior Court of the State of California, alleging five causes of action stemming from his discriminatory treatment and subsequent termination from Northrop, without cause, on February 15, 2002. Prior to trial on July 28, 2003, Northrop brought its Motion *in Limine* No. 2 to exclude evidence of a "stray remark." Bruenn objected the motion, but the evidence was characterized as hearsay – the motion was granted and the evidence was excluded. Trial commenced on October 6, 2003. On October 17, 2003 the matter was submitted to the jury. Within an hour of jury deliberations, the trial court judge received a note from the jury foreperson stating that one of the jurors was having trouble speaking English. The court responded that it was too soon to tell whether proper deliberations would take place and that the jury should "come back fresh on Monday." Bruenn was unaware of the juror note at the time of the trial. The jury verdict found in favor of Respondents.

B. The California Court of Appeal Proceeding

Petitioner appealed to the Court of Appeal of the State of California, Second Appellate District, Division Five, which affirmed the trial court decision rendering judgment against Petitioner and in favor of Respondents relative to Petitioner's employment discrimination claim arising from violation of FEHA.

As to the exclusion of evidence issue, the appellate court washed its hands, refusing to view the evidence objectively by stating, "[i]t was plaintiff's burden to establish a clear case of abuse and a miscarriage of justice (citing Burns v. 20th Century Insurance Co., (1992) 9 Cal.App.4th 1666, 1675). Plaintiff has failed to meet his burden. Nor is it reasonably probable that a result more favorable to plaintiff would have been reached if the proffered evidence of the 'stray remark' had been admitted." Id., at pp. 1675-1676 (citing Pool v. City of Oakland, 42 Cal.3d 1051, 169 (1986)). But the statement, or "stray remark" as it is referred to, was not offered to prove the truth of the matter asserted, but rather to bring to light the "state of mind" of the speaker [Mr. McClain], and to establish that the hostile work environment was real, not illusory. The Court of Appeal later denied Petitioner's Motion for Rehearing.

On the issue of juror incompetence, the appellate court's opinion states, "the record does not reveal that the court had any actual information, which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and justify his removal from the case." The court further stated, "[a] juror's inability to perform his functions 'must appear in the record as a demonstrable reality and bias may not be presumed.'" (citing People v. Beeler, 9 Cal.4th

953, 975 (1995)). But the record resonates loud and clear; the juror's note is demonstrable evidence of juror incompetence. The trial court so realized, but failed to act within its duty and authority to investigate, sheepishly sweeping the matter under the rug through its unsound logic that "[t]he Court has no ability to provide a translator." The appellate court further noted in its opinion that trial counsel were notified of the October 17, 2003 juror note and that by posting no opposition the parties waived their right to appeal on the presumption of prejudice issue. The court stated, "[a]n appellate court will not consider procedural defects or erroneous rulings where an objection could have been, but was not, raised in the court below."

C. The California Supreme Court Proceeding

Exercising his constitutional right under California law, Bruenn filed a timely appeal of the Second Appellate Court of Appeal's final decision and judgment, once again contesting the failure of the trial court to initiate an investigation into the juror misconduct/incompetence matter and the granting Respondents' Motion *in Limine* No. 2, which blocked the admission of essential evidence supporting Bruenn's claim of discrimination on the basis of medical disability. But for the granting of the motion, Bruenn would have submitted evidence establishing that the hostile work environment, coupled with innuendoes and misperceptions about his disability, were the true cause of his wrongful termination.

The California Supreme Court, in total disregard of Bruenn's constitutional right to a fair, impartial and competent jury, and apparently un-moved by the prejudicial

ruling relating to alleged "stray remark," refused to address the merits of the case. (App. 1a). The Supreme Court of the State of California denied Bruenn's Petition for Review. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This petition should be granted because the trial court's failure to remove an incompetent juror is repugnant to the democratic ideal of trial by a fair, impartial and competent jury pursuant to the Seventh Amendment to the United States Constitution and art. I, Section 16 of the California Constitution. The trial court had both the duty and authority, pursuant to C.C.P. § 233,[6] to easily remedy the problem of the incompetent juror once the matter was brought to its attention, yet it failed to act at all.

The trial court's failure to investigate the juror incompetence issue violates this Court's holding in Tanner, which stands for the proposition that "due process implies an impartial and mentally competent jury." Tanner v. United States, 483 U.S. 107, 126 (1987) (citing Jordan v. Com. of Massachusetts, 225 U.S. 167, 176 (1912)). The Tanner court wrestled with these thorny issues of juror incompetence and post verdict investigation, but felt there were enough safeguards in place to protect the party's rights. The trial court's inaction in the instant case also conflicts with a more recent California Court of Appeals holding that "having unqualified jurors on the panel constitutes reversible error

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[6] Section 233 provides in pertinent part: "[U]pon good cause shown to the court," the court may discharge a juror "found to be unable to perform his or her duty" and replace the offending juror with a properly selected alternate. C.C.P. § 233.

per se because it deprives litigants of their Constitutional right to a fair hearing before a qualified jury." McDonald v. Southern Pac. Transp. Co., 71 Cal.App.4th 256, 266 (1999).

In addition, this case involves the improper exclusion of relevant, admissible and material evidence from trial, in violation of Cal. Evid. Code § 351,[7] thereby undermining Petitioner's ability to rebut the employer's "pretextual" termination, supporting his theory of discriminatory termination under FEHA, Cal. Gov. Code § 12920, *et seq.* FEHA is a remedial statute articulating a fundamental civil right – "[t]he opportunity to seek, obtain and hold employment without discrimination." Cal. Gov. Code § 12921. FEHA prohibits employment discrimination, harassment and retaliation based upon race, religious creed, color, national origin, ancestry, physical disability (including AIDS and HIV), mental disability, medical condition, marital status, sex, age or sexual orientation. The prohibition includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. Physical and mental impairment includes conditions that are disabling, potentially disabling, or perceived as disabling. Cal. Gov. Code § 12940.

The legislature's intent in enacting FEHA has been clear and unambiguous from the beginning: To establish a "comprehensive scheme for combating employment discrimination." Snipes v. City of Bakersfield, 145 Cal.App.3d 861, 865 (1983). As a matter of public policy, FEHA recognizes the need to protect and safeguard the right

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[7] Section 351 provides in pertinent part: "Except as otherwise provided by statute, all relevant evidence is admissible." Cal. Evid. Code § 351.

and opportunity of all persons to seek and hold employment free from discrimination. Cal. Gov. Code § 12920. Moreover, the opportunity to be free from discriminatory practices in seeking, obtaining and holding employment is a civil right. Cal. Gov. Code § 12921. Bruenn was thought to be afflicted AIDS, and as a result he was shunned by his co-workers and subjected to a hostile work environment on a daily basis. Bruenn's condition places him within the class of people protected by FEHA. In addition, the use of negative work evaluations further supports Bruenn's theory that his termination was pretextual because his earlier "good" evaluations are inconsistent with his negative evaluations.

I. THIS CASE PRESENTS A FUNDAMENTAL CONSTITUTIONAL RIGHTS ISSUE THAT WAS DECIDED ERRONEOUSLY BY THE COURT BELOW, IN VIOLATION OF THE SEVENTH AMENDMENT RIGHT TO TRIAL BY A FAIR, IMPARTIAL AND COMPETENT JURY

As shown below, the California Supreme Court's order, affirming the lower court findings and decision, narrowed and nearly obliterated the Seventh Amendment and state-granted constitutional right to a fair, impartial and competent jury trial through the creation of a legal fiction that the "presumption of prejudice" can be rebutted by the trier of fact, *sua sponte*, thus permitting the trier of fact to bypass the need to conduct a hearing and relieving the non-moving party of its shifting burden of proof.

A. The California Supreme Court's Denial of Bruenn's Petition for Review Without Reaching the Merits of his Appeal Conflicts With the Analysis in Tanner v. United States, 483 U.S. 107 (1987).

This petition presents an opportunity for this Court to resolve a conflict over whether a state court violates the Seventh Amendment right to trial by a fair, impartial and competent jury when it strips a litigant of his right to challenge a verdict based on new information that one of the jurors lacked sufficient English proficiency skills to understand the proceedings and to participate meaningfully in deliberations, thus rendering the juror incompetent, *per se*. Juror incompetence or misconduct due to a severe lack of English proficiency skills is an issue that needs clarification from this Court.

The issue of juror misconduct usually involves allegations of juror bias, extrinsic or intrinsic, but in the instant case the issue relates to juror incompetence on account of limited English proficiency, preventing the juror from performing his duties under C.C.P. § 203(a)(6); thus rendering him "unqualified" to participate in deliberations. This right to a fair and impartial jury implies "the right to a mentally competent jury." McIlwain v. United States, 464 U.S. 972, 975 (1983) (citing Jordan, supra, at 176). The McIlwain court grappled with this very same issue of juror incompetence, *albeit* on the different level of temporary insanity or incompetence. Petitioner in McIlwain analogized a case where "the trial judge received a note from members of the jury stating that they 'would like to change the foreperson of the jury due to the fact that the present

foreperson seems somewhat unable to preside this morning'" due to his intoxication. McIlwain, at 973 (citing Lee v. United States, 454 A.2d 770, 772 (D.C. App. 1982)).

The trial judge conducted "a separate *voir dire* of each member of the jury," and "suggested that the petitioners agree to an arrangement whereby the foreman of the jury would be dismissed and the case would be submitted to the remaining 11 jurors." McIlwain, at 972. The Petitioners scoffed and "rejected that suggestion and proposed instead that the judge declare a mistrial." Id. After concluding the *voir dire*, "[t]he trial judge acknowledged that the juror in question was 'somewhat under the influence in a fashion . . . that makes deliberations . . . inappropriate at this time,'" but "[i]nstead, he ordered an immediate three-day recess, noting that his hope that the 'offending juror [would be] perfectly sober and able to deliberate' on Monday when deliberations would resume." Lee, supra, at 773. The District of Columbia Court of Appeals affirmed the petitioners' convictions, reasoning that "[t]he recess, coupled with the judge's checking in on the jury on Monday, both of which were done with the concurrence of appellants' counsel, foreclosed the possibility of prejudice. Under these circumstances, it cannot reasonably be said that the appellants were substantially deprived of their right to the judgment of objective and competent jurors." Id., at 774. Lee supports the notion that juror incompetence could undermine constitutional protections as they relate to jury trials.

The Tanner court dealt with the broader view of juror misconduct and held that "[d]ue process implies a tribunal both impartial and mentally competent to afford a hearing."

Tanner, supra, at 126) (citing Jordan, supra, at 176). Unfortunately, the Tanner court stopped short of validating post verdict investigation into juror misconduct, fearing investigations would tarnish the process and reduce the effectiveness of the jury system, notwithstanding "irresponsible or improper juror behavior." Tanner, at 142.

In the instant case, the trial court judge received a note from the jury foreperson stating that one of the jurors was having trouble speaking English. The juror in question had difficulty participating in deliberations and had requested a translator, which the court swiftly denied. Clearly, the juror in question was going to be just as incompetent on Monday as he was on Friday, so the logical follow-up question is why continue the deliberations until Monday if there is no useful purpose to be gained by continuing the matter a few days? The juror's ongoing and permanent inability [for purposes of the trial and deliberations] to participate in deliberations was tantamount to juror incompetence and/or misconduct.

This case is distinguishable from Lee on three critical points, the nature and duration of the incompetence. First, the offending juror in Lee was voluntarily incompetent due to his drunken state. Here, the offending juror was involuntarily incompetent due to his lack of English proficiency skills. Second, the offending juror's incompetence in Lee was brief and temporary, a condition easily remedied and alleviated with proper rest and diet [*e.g.*, by remaining sober]. Here, however, the offending juror was permanently incompetent [relatively speaking, for purposes of the eight-day trial and short deliberations], *i.e.*, the limited-English-speaking juror here could not reasonably be expected to miraculously attain English proficiency over the weekend, no matter how much

he studied or practiced. The juror himself realized the gravity of the situation and, to his credit, requested a translator because he could not understand the deliberations. Third, the allegations in Lee pertained only to jury conduct during deliberations. Because jury deliberations occur outside the presence of the trial judge, evidentiary hearings may be more appropriate in that setting. Here, however, the offending juror's incompetence (and misconduct), stealth as they were during the trial, were clearly demonstrable, such that he was unable to participate in any meaningful deliberations. The trial judge, upon receiving evidence of juror incompetence, had the authority to easily remedy this issue pursuant to C.C.P. § 233, but he failed to act decisively. The minimum first step would have been to conduct an evidentiary hearing to determine whether the juror was able to perform his duties. C.C.P. § 233 provides that "upon good cause shown to the court," the court may discharge a juror "found to be unable to perform his or her duty" and replace him or her with a properly selected alternate. An alternate was in fact available. But the court denied the juror's request for a translator and failed to conduct any investigation – an act that constitutes prejudicial and reversible error.

In short, the nature and duration of the juror's incompetence in Lee was voluntary and temporary due to his intoxication, easily remedied with the passage of a day or two. But here, the nature and duration of the incompetence was involuntary and relatively permanent, due to the juror's limited English proficiency skills. The court's failure to investigate where an investigation was mandated proved to be more prejudicial to Petitioner's case than failing to provide a translator. An investigation into the matter would have resulted in the juror being dismissed and replaced by the

alternate; an alternate was in fact available. And unlike Lee where the judge conducted a separate *voir dire* of each member of the jury, here the trial judge failed to acknowledge that there was a problem, and thus never arrived at the investigative stage, even while staring at the problem face-to-face. Instead he merely postponed the deliberations to the following Monday. But the offending juror in this case was just as incompetent on the following Monday as he was on Friday

A leading Ninth Circuit also involving juror misconduct stands for the proposition that a presumption of prejudice arises from any juror misconduct or incompetence. Hasson v. Ford Co., 32 Cal.3d 388, 416; 650 P.2d 1171; 185 Cal. Rptr. 654 (1982). The Hasson court logically reasoned that "civil litigants, like criminal defendants, have a constitutionally protected right to the complete consideration of their case by an impartial panel of jurors." (U.S. Const., 7th Amend.; Cal. Const., art. I, § 16) Hasson, at 416 (citing Andrews v. County of Orange, 130 Cal.App.3d 944, 953 [182 Cal.Rptr. 176] (1982); People v. Honeycutt, 20 Cal.3d 150, 156, [141 Cal.Rptr. 698, 570, P.2d 1050] (1977)). The Hasson court, however, reiterated that a new trial is required *only* [emphasis added] if the complaining party can establish prejudice by the juror's inattentiveness and/or incompetence, the "rebuttable presumption" standard.

Notwithstanding the testimonial evidence by bailiffs, court staff, and juror declarations corroborating the allegation of juror misconduct [jurors reading books and doing crossword puzzles], the Hasson court chipped away at the "presumption of prejudice" rule through creation of the legal fiction that a "showing of misconduct is rebutted by an

examination of the record which reveals no substantial likelihood that Ford was given anything less than a full and fair consideration of its case by an impartial jury. The instances of misconduct demonstrated here do not rise to the level of evidence 'of such a character as is likely to have influenced the verdict improperly.' (citing Cal. Evid. Code § 1150(a)). The trial court so found in its denial of a motion for new trial." Hasson, at 417-418. The sole dissenting opinion by Justice Richardson chastised the majority rule, stating "[j]uror misconduct has occurred in several forms requiring reversal when prejudice is *presumed* in the absence of evidence to rebut the presumption." Hasson, at 422.

In the instant case, the California Supreme Court ignored and completely bypassed the "presumption of prejudice" rule and failed to give any weight to constitutional ramifications when it received the juror note and failed to investigate. The note was unambiguous and offered proof of the offending juror's inability to perform his duties. "The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations. Each juror should attempt to follow the trial proceedings, and to evaluate the strengths and weaknesses of the evidence and arguments adduced by each side so that the jury's ultimate determinations of the factual issues presented to it may be based on the strongest foundation possible." In other words, each juror must be able to actively participate in the deliberation process; to exchange ideas and offer different viewpoints – in essence, to have meaningful discourse, to listen and present their own analysis. Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled. (U.S. Const., 7th Amend.;

Cal. Const., art. I, § 16.) Hasson, at 416. Absent any rebuttable presumption, the trial court judge should have ordered a new trial or at the very minimum dismissed and replaced the offending juror.

Here, though the safeguards were in place, they did not work and the result now jeopardizes the effectiveness of the jury system. In affirming the appellate court's judgment, the California Supreme Court should have given sufficient weight to Bruenn's discussion relating to the constitutional rights violations as regards the juror incompetence issue. There was good cause to doubt a juror's ability to perform his duties and justify his removal. The jury foreperson's note makes clear that his fellow juror's poor English skills jeopardized the entire deliberations process. The trial court was obligated to investigate the jury's claims as to the offending juror's ability to serve. See People v. Castorena, 47 Cal.App.4th 1051 (1996).

In Castorena, a criminal murder case, a juror wrote a note to the trial court after five days of deliberation that she believed there was a juror (Patricia S.) who was not using the evidence and was not deliberating. Id., at 1057. The trial court investigated the matter by speaking individually with several jurors and several stated their belief that Patricia S. was not willing to support her opinions with the law and evidence, but there were also opinions that stated she was participating in deliberations to some degree. Patricia S. was not interviewed and the trial court admonished the entire jury to participate in deliberation. Two days later the trial court received another note from a juror stating that she did not believe Patricia S. was deliberating.

Argument from counsel was heard as to whether to remove Patricia S. The trial court elected to again interview five jurors before making a determination to remove Patricia S. and replace her with an alternate juror under C.C.P. § 233. The court of appeals found that the trial court had abused its discretion by failing to investigate the claims raised in Patricia S.'s note prior to dismissing her and that such abuse was prejudicial. In that regard the court of appeals stated that it could not speculate as to what would have occurred had a proper investigation been conducted. Id., at 1066. The trial court had an obligation to investigate when this note was received because the note constituted "good cause" to doubt the juror's ability to perform his duties. "Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty to 'make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." People v. Espinoza, 3 Cal.4th 806, 821 (1992) (quoting People v. Burgener, 41 Cal.3d 505, 520 (1986). In Espinoza, the court concluded that defense counsel's "mere speculation" that a juror might have been sleeping was insufficient to apprise the trial court that good cause might exist to discharge the juror, and therefore did not obligate the court to conduct any further inquiry. Espinoza, at 821.

Here, however, there was no speculation because it was evident from the jury foreperson's note that the offending juror needed an interpreter to understand and participate in the deliberations. The court's obligation to investigate was not dependent on the urging of counsel. This note was in the hands of the court, and the court deals with and manages the jury. And the court had in its hands patently "good cause" to doubt this juror's ability to perform.

B. Post Judgment Augmentation of the Record Violates Generally Applicable Rules of Appellate Procedure and Bruenn's Constitutional Right to a Fair Trial.

Bruenn was not given the opportunity to review and rebut the juror's note because the trial judge did not reveal its existence to counsel. "[C]onsideration of postjudgment evidence in appeal . . . violates generally applicable rules of appellate procedure." See In re Zeth S., 31 Cal.4th 396, 413 (2003). In Zeth S., an appeal challenging the juvenile court's finding that the beneficial relationship exception to adoption did not apply, appellate counsel sought to augment the record on appeal with postjudgment evidence. The evidence was unsworn. The California Supreme Court was concerned that the appellate court had taken what was in essence a substantial evidence issue and used new evidence to revisit the "mother-child" relationship.

In the case at bar, the evidence of the juror note was kept from counsel, the result being that counsel for Petitioner could not object to the note nor request a hearing. The appellate court suggests that the matter was waived. As such, Bruenn's right to a fair and impartial jury trial was violated. The juror note establishes "good cause" to support an investigation into the juror incompetence issue. Counsel for Petitioner was unaware of the note's existence at time of trial. The note was later included in the file through post-judgment augmentation proceedings in May 2005, nearly two years after the October 2003 jury verdict. Had counsel for Petitioner been properly informed as to the juror note, counsel would have acted accordingly. And although the

court of appeals states that Bruenn failed to excuse the juror in question, it was not counsel's obligation to do so. It was the trial court's obligation, which should have been performed *sua sponte*. Removal and replacement of jurors is the responsibility of the court, not counsel.

II. THE TRIAL COURT IMPROPERLY EXCLUDED RELEVANT EVIDENCE FROM THE JURY'S CONSIDERATION, IN VIOLATION OF EVIDENCE RULES AND BRUENN'S CONSTITUTIONAL RIGHT TO A TRIAL ON THE MERITS.

The decision below conflicts with three recent California Supreme Court decisions dealing with adverse employment actions under FEHA. In August 2005 the California Supreme Court clarified the standard for opposing unlawful conduct, and resolved a conflict among the lower courts about how to define an adverse employment action.

A. The Trial Court Abused its Discretion by Granting Respondent's Motion *in Limine* No. 2 and Excluding Relevant Evidence From the Jury's Consideration; Evidence That Would Have Established A Hostile Work Environment Under FEHA.

The decision of the trial court to exclude the "don't ask, don't tell" statement is violative of Cal. Evid. Code § 351 and is in conflict with a recent retaliatory termination rulings by the California Supreme Court, which held that an employee

can maintain a retaliatory action against an employer even where the employee's protected activity is "subtle" and the employer's actions are negligible. Yanowitz v. L'Oréal USA, Inc., 36 Cal. 4th 1028, 1047 (2005).

In Yanowitz, an employee's refusal to follow a supervisor's order that the employee reasonably believes to be discriminatory constitutes a protected activity under FEHA. Yanowitz was given a directive from her male supervisor to terminate a female sales associate who was not sufficiently sexually attractive. Yanowitz was subjected to hostile and adverse environment when she demanded "adequate justification" for having to follow the company's directive. The appellate court had applied the "deterrence" test, formulated by the federal Equal Employment Opportunity Commission (hereinafter "EEOC"), to reverse the trial court's grant of summary judgment in favor of L'Oréal. In affirming the appellate court decision, the California Supreme Court focused on two key issues: 1) Whether Yanowitz had engaged in a protected activity when she refused to terminate a sales associate; and 2) whether L'Oréal's actions constitute an adverse employment action sufficient to establish *prima facie* claim of retaliation. The California Supreme Court reasoned that the request for "adequate justification" placed L'Oréal on notice that "she was blowing the whistle on discrimination." The court noted, "[i]t is not difficult to envision circumstances in which a subordinate employee may wish to avoid directly confronting a supervisor with a charge of discrimination and the employee engages in subtler or more indirect means in order to avoid furthering or engaging in discriminatory conduct."

The court also reasoned that L'Oréal's conduct towards Yanowitz could be deemed retaliatory because "there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging injuries." Yanowitz, supra, at 1055 (citing Bass v. Board of County Com'rs, Orange County, Fla., 256 F.3d 1095, 1118 (11th Cir. 2001) (retaliatory actions that did not deprive plaintiff of compensation and may not have individually constituted adverse were, when viewed collectively, actionable). "Actions that threaten to derail an employee's career are objectively adverse" and could support a jury finding of an adverse employment action. Yanowitz, at 1061. The court further held that "the proper standard for defining an adverse employment action is the 'materiality' test, a standard that requires the employer's adverse action to materially affect the terms and conditions of employment). Id., at 1036 (citing Akers v. County of San Diego, 95 Cal.App.4th 1441, 1454-57 (2002)).

California appellate courts, with the notable exception of Thomas v. Department of Corrections, 77 Cal.App.4th 507 (2000), routinely evaluate retaliation cases by applying a totality of circumstances approach to the various elements of the *prima facie* case. See, *e.g.*, Akers, supra, at 1456-57 (applying totality of circumstances to adverse action requirement; jury verdict upheld because in the totality of circumstances defendant's actions made plaintiff "unpromotable"); Birschtein v. New United Motor Mfg., Inc., 92 Cal.App.4th 994, 1006 (2001) (applying totality of circumstances test to adverse action requirement; summary judgment reversed because in the totality of circumstances, trier of fact could find employer's failure to prevent or end co-worker behavior manifesting sex based *animus* amounts to

ratification of the misconduct); Colarossi v. Coty US, Inc., 97 Cal.App.4th 1142, 1151-55 (2002) (caution/intent requirement; summary judgment reversed because in the totality of circumstances, trier of fact could reject defendant's explanation for termination). The term "adverse employment action" does not appear in the language of FEHA or in Title VII, "but has become a familiar shorthand expression referring to the kind, nature or degree of adverse action against an employee that will support a cause of action under a relevant provision of an employment discrimination statute." Yanowitz, at 1049. Thus, in order to determine whether something is an "adverse action" for the purpose of retaliation under FEHA, it must be judged from the perspective of the "reasonable person in the plaintiff's position."

In the case at bar, Bruenn's complaint against Marks can be traced back to his chronic hepatitis C diagnosis and the belief by his co-workers that Bruenn was afflicted with AIDS. On Bruenn's return from medical leave he was subjected to a campaign of retribution by his supervisors and shunned by his co-workers. The excluded "don't ask, don't tell" statement related to the military policies of the Clinton Administration relative to homosexuality and to further infer, in context of the medical leave discussion, that the supervisors and co-workers believed Bruenn to be a homosexual with AIDS. On January 7, 2002, Bruenn met with Terry L. Haberman, Manager, Human Resources, to file a grievance against Marks because of his continued verbal abuse and negative evaluations. Northrop's combined actions, in particular the negative evaluations, substantially altered Bruenn's working conditions and created a hostile work environment, which Bruenn attributes to his

termination. Bruenn received a favorable work evaluation in December 2000, prior to the onset of physical manifestations of his illness. (App. 27a-28a). Bruenn argues that his "B" rating employment evaluation supports the contention that his termination was discriminatory, based on Northrop's genuine belief that Bruenn was homosexual and afflicted with AIDS – in violation of FEHA. Northrop's actions are clearly retaliatory on their face. But for Bruenn's complaint against Marks, Bruenn would not have been terminated.

B. The Court Erred in Granting the Motion *in Limine* No. 2 Because the Excluded Statement Was Relevant to Showing Pretext.

California courts have adopted the U.S. Supreme Court's approach for analyzing discrimination cases under FEHA with respect to presumptions and burden shifting. Accordingly, Bruenn had the initial burden to establish a prima facie case of discriminatory termination by showing that: 1) He was a member of the protected class; 2) he was performing his job satisfactorily; and 3) he was terminated; and 4) he was replaced by a person outside of the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). Once Bruenn satisfies this minimal showing, the burden shifts to Respondent to offer a legitimate, non-discriminatory reason for the termination.

Northrop offered evidence to support the claim that it terminated Bruenn for poor performance, including his inability to interact with others. At this point, the burden shifted back to Bruenn to introduce evidence that the explanation offered by Respondent was not credible, that is

was a pretext. It is at this stage of the analysis that the statement "don't ask, don't tell," and the situation within which it was made, becomes relevant. Bruenn argued to the trial court that this statement was made by Mr. McClain, a decision-maker within the Northrop management structure, as they were discussing the reason for Bruenn's extended medical leave, the inference of course that Bruenn was a homosexual afflicted with AIDS. The manner in which it was stated, the response of the listeners, the context of the conversation would all be admitted for the jury's consideration as to whether these co-workers actually believed Bruenn had AIDS or some other contagious disease. Because of the court's ruling, none of this evidence was allowed in. This connection is relevant to establish pretext.

The appellate court reasoned that because of the "consistent testimony from Mr. Marks concerning plaintiff's serious deficiencies in work performance before he left on medical leave, it is unlikely that the inclusion of this evidence would have altered the outcome of the trial. Substantial evidence supports the jury's apparent determination of problems in plaintiff's job performance, and thus its specific finding that plaintiff was not discharged in substantial part due to his disability." The court erred in granting the Motion *in Limine*, and it erred in its analysis that the outcome would have remain unchanged even had the evidence been allowed. Accordingly, "cumulative errors may be deemed prejudicial and warrant reversal even though independently they would have been deemed harmless." Johnson v. Tosco Corp., 1 Cal.App.4th 123, 141 (1991).

At trial Marks testified that he had concerns about Bruenn's medical condition, which he expressed in writing to the Human Resources Department in anticipation of Bruenn's return from medical leave. Additionally, Marks admitted that he actively sought out the reasons for Bruenn's medical leave from the healthcare providers out of his claimed curiosity. Marks further denies that he had any idea that Bruenn had a medical condition at any time before he went on medical leave, despite testimony that Bruenn's symptoms caused his face to swell, turn red and become "grotesque" for days at a time. Bruenn testified that his co-workers would not even say "hi" to him when he returned to work, and that they completely avoided him. Thus, the evidence of the statement, in combination with other evidence of retribution and scorn, was offered not as direct evidence of discriminatory motive by Northrop, but rather as defense to Respondent's justification for the termination.

III. THE QUESTIONS PRESENTED RAISE ISSUES OF SIGNIFICANT NATIONAL IMPORTANCE

Finally, there can be no question that the two issues presented here are of national significance. Regarding the first issue, the right denied by the California Supreme Court – the right to trial by a fair, impartial and competent jury – is found in the Seventh Amendment to the United States Constitution and state constitutions across the country. See California Const., art. I, Section 16 ("Trial by jury is an inviolate right and shall be secured to all, . . .").

If the California Supreme Court can extinguish that right through the creation of legal fictions that negates the

"presumption of prejudice" standard established in Hasson, then the Seventh Amendment becomes meaningless. The Tanner court agreed and proclaimed that the term "competent jury" implies having qualified jurors who understand and can effectively communicate in English. But unfortunately Tanner fell short when it ruled that validating post verdict investigation into juror misconduct would erode the effectiveness of the jury system by second guessing jury verdicts. On the contrary, post verdict investigations would ensure that Seventh Amendment protections would not be lost.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

Dated: January 13, 2006

VAUGHN H. BRUENN
16317 E. Lemongrass Ct.
Valinda, California 91744
Tel. 626/622.6597

APPENDIX

APPENDIX A

Court of Appeal, Second Appellate District,
Division Five – No. B172740
S136613

IN THE SUPREME COURT OF CALIFORNIA

En Banc

VAUGHN BRUENN,

Plaintiff and Appellant

v.

NORTHROP GRUMMAN CORPORATION,

Defendant and Respondent

Petition for review DENIED

Kennard, J., was absent and did not participate

BY THE COURT:
[SEAL]

/s/ Ronald M. George
RONALD M. GEORGE
Chief Justice

APPENDIX B

NOT TO BE PUSLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VAUGHN BRUENN, Plaintiff and Appellant, vs. NORTHROP GRUMMAN CORPORATION, et al., Defendant and Respondent.	B172740 (Los Angeles County Superior Ct. No.BC2800576)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andria K. Richey, Judge. Affirmed.

Law Offices of Robert Risley, Robert L. Risley, for Plaintiff and Appellant Vaughn Bruenn.

Sheppard, Mullin, Richter & Hampton LLP, Charles F. Barker, Natalie C. Trask, for Defendant and Respondent Northrop Grumman Corporation.

INTRODUCTION

Plaintiff and Appellant Vaughn Bruenn appeals from a judgment in favor of defendant and respondent Northrop Grumman Corporation, following a jury trial, on his single cause of action for damages arising from violation of the Fair Employment and Housing Act, Government Code section 12940 et seq. (FEHA). Plaintiff contends on appeal that the trial court abused its discretion in granting defendant's motion in limine excluding a "stray remark," and in failing to investigate the competence of an unidentified juror following receipt of a note from the jury early in the deliberations. Plaintiff also asserts that these errors cumulatively warrant reversal. Finding no error and hence no abuse of discretion under the applicable standard with respect to either issue, we affirm.

BACKGROUND

Defendant's predecessor in interest, Aerojet General, hired plaintiff Vaughn Bruenn in May 2000, as a Senior Estimating Specialist, a level four out of five levels. Level five is the most senior and is the level of a "nationally renowned expert." A person at this level was expected to

operate independently, gather and analyze data, and "handle the full range of activities" in the estimating and analysis process. Plaintiff had nearly twenty years of experience as a cost estimator in the aerospace industry, including work for Rocketdyne Rockwell, McDonnell Douglass Aerospace and British Aerospace Company. Plaintiff reported to and worked with Kenneth Marks, the head of a group that did cost estimating and pricing. Mr. Marks had thirty years of experience in cost estimating, and had been employed by General for fourteen years. Plaintiff was hired as an at-will employee and thus would not have had any expectation that he would be employed for a particular period of time.

Plaintiff's work during the first year of his employment did not meet Mr. Mark's expectations. Although Mr. Marks did not document his negative performance evaluation of plaintiff in writing during 2000, he gave plaintiff a great deal of feedback as part of ongoing training, in an attempt to improve his job performance. He opined that plaintiff's job performance was not consistent with what was appropriate for his position. Mr. Marks formed this opinion within a week or two after plaintiff arrived at the company. He found plaintiff "throughout his

whole period of employment . . . amazingly resistant to improvement."

Plaintiff testified that he worked with several different people within the company during 2000, on a variety of tasks, and that Mr. Marks gave him no feedback and no negative oral criticism during this time. Plaintiff testified that Mr. Marks was "very satisfied" with plaintiff's audit of the work of a fellow employee, Louie Gustis. Plaintiff also asserted that he had continual problems with the functioning of his computer, problems which Mr. Marks refused to address.

Mr. Marks gave plaintiff his first written evaluation in February 2001. He advised plaintiff that his performance did not meet expectations. In mid-May 2001, he placed plaintiff on a 90-day performance plan (or development plan), with the goal of improving plaintiff's performance to an acceptable level. During this 90-day period, Mr. Marks met on a weekly basis with plaintiff to discuss his performance. When Mr. Marks was away on vacation, Dennis Evans, another cost estimating specialist, conducted the weekly meetings. Plaintiff signed summaries of the weekly meetings. Plaintiff's job performance continued to fall short of expectations throughout the time period of this plan and

the entire period of his employment. On July 27, 2001, Mr. Marks informed plaintiff that he would be terminated in 30 days if his job performance did not improve. Plaintiff disputed having received this written notice and did not recall being given such an oral notice. Plaintiff understood that if he did not measure up to the requirement of the development plan he would be terminated.

The parties differed as to the tenor of the weekly meetings, with plaintiff characterizing Mr. Marks as shouting at him and slamming doors, and Mr. Marks denying that this had ever happened. Plaintiff later reported this alleged conduct to Mr. Haberman, Manager of Resources and staffing for defendant. According to Mr. Haberman, plaintiff never told him that Mr. Marks had shouted at him or slammed doors.

Starting in December 2000, Plaintiff had been experiencing frequent pain, swelling in his face, pain in his elbow and fatigue. He went through a particularly painful episode around Valentine's Day, 2001, which was corroborated by the testimony of his girlfriend, Ms. Lin. At around the same time as the first critical written evaluation in February 2001, plaintiff consulted a doctor for these symptoms. The doctor diagnosed plaintiff as having

Hepatitis C. Plaintiff did not tell Mr. Marks or his co-workers of his diagnosis. Plaintiff admitted that no one at his employer knew of his illness in 2000 or in early 2001, and that he had already received critical oral evaluations from Mr. Marks before he learned of the diagnosis on February 24, 2001.

Plaintiff commenced a course of treatment for his illness involving powerful drug therapies in May 2001. The treatment was debilitating, made his symptoms worse, and the symptoms interfered with his ability to work. Plaintiff avoided other people when his face swelled up. Plaintiff commenced a medical leave on August 3, 2001, less than two weeks before the 9- day development plan – which had begun May 16, 2001 – was due to end. Plaintiff was also diagnosed with depression, for which he received medication during his leave. Plaintiff's medical leave was originally for four months, and then extended to five months.

Mr. Marks, Mr. Evans, and other defense witnesses denied ever noticing plaintiff with a swollen or red face, swollen elbow, or seeing plaintiff hide in his office or otherwise conduct himself as if he felt ill. Mr. Marks testified that he was "totally flabbergasted" when plaintiff went on medical leave in early August 2001. Mr. Marks and

other defense witnesses indicated they did not know why plaintiff went on medical leave and did not find out the reason until after plaintiff's termination. During plaintiff's leave, Mr. Marks did ask one of the company nurses why plaintiff was out on leave.

Plaintiff returned to work from his medical leave on January 7, 2002. At this time he was under no medical restrictions in his ability to work. Mr. Marks gave him a new assignment. Plaintiff failed to complete the assignment to Mr. Marks's [*sic*] satisfaction. He was terminated on February 15, 2002.

Plaintiff said that he was shunned by his coworkers upon hi return from his medical leave. He testified that he had reported the difficulties he had in dealing with Mr. Marks and that no one in his department would even say hello to plaintiff his day back. According to plaintiff, Mr. Marks had learned of plaintiff's disability while he was on leave and communicated it to others, causing them to shun him upon his return. Plaintiff believed his work was adequate or improving; that he had developed proficiency in certain areas; and that the negative evaluations of his work, which were first put in writing when he was experiencing a severe flare up, were inaccurate, unfair or pretextual. Plaintiff

testified that the last assignment Mr. Marks gave him, in January 2000, immediately upon his return from a five month medical leave, could never have been completed within the time frame demanded. He presented evidence from an experienced engineer in support of this contention. Plaintiff had previously applied for a security clearance that had not come through, and the lack of the security clearance had a "considerable amount of impact" on his ability to complete the project he was given in January upon his return.

Plaintiff contended that the motivating factor for his termination was his medical disability, an impermissible reason under FEHA. Mr. Marks and other defense witnesses denied disclosing any confidential medical information pertaining to plaintiff, and said that the motivating factor for plaintiff's dismissal was his work performance. Various defense witnesses testified that they did not know plaintiff's medical condition. Some defense witnesses also testified that plaintiff did not allege discriminatory conduct or harassing behavior by Mr. Marks prior to his termination.

The parties disputed whether or not plaintiff had been given the proper amount of time to perform under the company's 90-day development plan and 30-day notice of termination in light of the timing of plaintiff's five month

leave. Plaintiff conceded that the failure to follow a personnel policy was not in itself discriminatory, and plaintiff's only claim was under FEHA, not for breach of contract. There were also disputes in the testimony regarding the "shunning" with defense witnesses characterizing plaintiff as someone who was "quiet" and "kept to himself" and denying that they avoided plaintiff.

Plaintiff participated in an internal dispute resolution process following his termination with, inter alia, a hearing officer employed by the defendant, Joe Mogilewski, who had not been involved in his department or the decisions to terminate him. After interviewing employees identified by plaintiff, speaking with plaintiff, and reviewing the file, Mr. Mogilewski concluded that the termination did not violate company policies, which prohibited discharges based on a medical condition or discrimination based on a medical condition. He reached the conclusion that plaintiff did not have the skills needed to perform effectively. In the internal company investigation following Plaintiff's termination, the notes of Human Resources Executive Mr. Gomez included the following remark and Mr. Gustis, a co-worker of plaintiff: "I would answer the question [raised by plaintiff [*sic*] then not see any results. I think that is why he kept to

himself. Maybe he didn't want to be found out that he didn't know what he was doing." The registered nurse who worked for defendant denied that she had disclosed plaintiff's medical condition to any other employee.

The parties agreed that plaintiff had appropriately exhausted his administrative remedies and mitigated his damages. Following argument, the jury commenced deliberations on Friday afternoon, October 17, 2003, at 3:12 PM.

The only claim on which the case was tried was plaintiff's claim for damages based on unlawful employment practices under FEHA. Plaintiff alleged that defendant engaged in the unlawful employment practice of terminating him on the bases of physical and mental disability, and harassing him on the bases of physical or mental disability. He also alleged discrimination based on disparate treatment. The court instructed the jury that the essential elements of a claim for unlawful disability discrimination included a finding that "the plaintiff's disability was a motivating factor of this termination." The court also instructed the jury on hostile environment harassment.

PROCEDURAL HISTORY

Motion in Limine No. 2 re "Stray Remark"

On July 28, 2003, defendant filed motion in limine number two to exclude evidence of a "stray remark." The plaintiff filed an opposition. Defendant filed a reply. Trial commenced on October 6, 2003, and the court heard argument from both sides on the motion in limine the same day. Following the hearing, the trial court granted the motion.

The remark in question was made by a Northrop employee who was not plaintiff's supervisor and not a decision-maker with respect to plaintiff's termination. The proffered evidence was that Plaintiff was asked after he returned to work from his medical leave why he went on leave. This other employee, identified in plaintiff's trial brief as Bob McClain, another manager, but not a supervisor of plaintiff, in the presence of several of plaintiff's co-workers, responded, "Don't ask, don't tell."

Plaintiff theorizes that the remark was associated with President Clinton's administration's policies on homosexuals in the military, and, that, in turn, in light of plaintiff's five month medical leave, his co-workers would have thought

Bruenn had AIDS. According to plaintiff, his manager, Mr. Marks, fostered the perception of plaintiff as a person having a serious, contagious disease. Further, as some of the defendant's work-related criticisms of plaintiff supporting his ultimate termination had to do with his not communicating well and obtaining necessary information from co-workers, and plaintiff said that he was shunned by his co-workers upon his return from medical leave because of the nature of his illness, thus directly impacting plaintiff's ability to perform his job in a negative way, plaintiff contends that the evidence was directly relevant to prove that Mr. Marks had "intentionally orchestrated a situation in which plaintiff would be shunned by people with whom he needed to interact in order to perform his duties." Plaintiff also argues that the statement was not offered to prove the truth of the matter asserted but rather the state of mind of the speaker, and of the surrounding co-workers, and therefore, was not hearsay.

Defendant asserts that the remark could not be interpreted in the manner posited by plaintiff, was not tied directly to plaintiff's termination, did not establish that plaintiff's co-workers shunned him or make it difficult for him to work with them, and even if somehow relevant, would

only have inflamed the passions of the jury and obscured the issues. Therefore, defendant contends it should have been excluded under California Evidence Code Section 352.

Note from the Jury

Shortly after deliberations began, the jury delivered a note to the trial court. We ordered augmentation of the record and ascertained that all trial counsel were present when this note was sent and when the trial court responded to it, and that all trial counsel were shown the court's note from the jury and the court's response before it was submitted to the jury.

The note from the jury stated: "One of our jurors, while understanding the testimony, is finding it difficult to understand the liberations [*sic*]. English is his second language. We all feel this may jeopardize our deliberations. He says he needs a translator." The note is signed by the foreman and dated "October 17, 2002" (The intended date was 2003.)

The trial court responded: "The Court has no ability to provide a translator. It is too early to determine that proper deliberations can't take place. Perhaps jury should recess and come back fresh on Monday."

There were no further communications between the jury and the trial court on the subject of the October 17, 2003 question prior to the return of the verdict later on Monday, October 20, 2003. The jury reached its verdict, a 9 to 3 verdict in favor of the defendant, at 2:30 PM, responding to questions on a special verdict form. The jury was polled. The identity of the juror who was having difficulty in understanding deliberations at the beginning, according to the note, was never disclosed in the record, and the nature of his vote is unknown.

DISCUSSION

Standard of Review

Generally, a trial court's ruing on a motion in limine will not be reversed on appeal absent a clear showing of abuse. (*People v. Mincey* (1992) 2 Cal. 4th 408, 439; 1 Wegner, Fairbank & Epstein, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2004) ¶ 4:307.10, p. 4-73.) "But if an improperly granted motion in limine prevents a party from offering evidence to establish its case, the error is reversible per se. [*Kelly v. New West Fed. Sav.* (1996) 49 CA 4th 659, 677, 56 CR2d 803, 813]." (Wegner, Fairbank & Epstein, ibid.)

The abuse of discretion standard also governs the trial court's rulings on juror competence. (*People v. Beeler* (1995) 9 Cal.4th 953, 975).) The trial court's rulings are presumed to be correct. If there is any substantial evidence to support the trial court's ruling, it will be upheld. (*People v. Cleveland* (2001) 25 Cal. 4th 466, 474, People v. Diaz (2002) 95 Cal.App.4th 695, 699-700.) A juror's inability to perform as a juror "must appear in the record as a demonstrable reality." (*People v. Cleveland*, supra, 25 Cal.4th at p. 474.)

Motion in Limine No. 2

Motion in Limine No. 2 sought to exclude the "don't ask, don't tell" statement. Plaintiff contends that the trial court abused its discretion in excluding relevant, and therefore, admissible, evidence under Evidence Code section 351. In particular, plaintiff states that the evidence was related under the sole cause of action remaining in the case at the time it went to trial, for violation of FEHA, because, although the statement was not made by a manager with decision-making authority relative to plaintiff's termination, it was circumstantial evidence relevant to the issue of "pretext" or discriminatory motive.

This one remark was not fundamental to plaintiff's presentation of his case. Its exclusion did not disable the plaintiff in his presentation. Plaintiff was given opportunities to describe his belief that the nature of his illness had been improperly communicated to others with whom he worked, that they shunned him, that this made it difficult for him to work with others upon his return from his medical leave, and similar factors. Plaintiff's counsel had the opportunity to question and did question several witnesses who worked at Northrop Grumman about their knowledge of the nature of plaintiff's illness before his termination, about Mr. Mark's behavior and attitude towards plaintiff, and about plaintiff's interactions with fellow workers. Numerous defense witnesses testified that they did not know for what reason plaintiff was out on medical leave, were not told by Mr. Marks or anyone else the nature of plaintiff's illness (except, in some cases, after the matter had gone to litigation), and, in any event, did not avoid or shun the plaintiff. Mr. Marks and the other defense witnesses testified that they never saw plaintiff with a swollen or red face or swollen elbow. The jury, considering disputed evidence, presumably chose to believe the defense witnesses and to disbelieve the plaintiff and his girl friend.

The "stray remark" was not uttered by anyone with decision-making authority over plaintiff's status as an employee. Thus, the speaker had no say in plaintiff's hiring or firing, and whatever his intended innuendo by saying, in response to an inquiry about why plaintiff was on medical leave, "don't ask, don't tell," the speaker could take no action whatsoever with respect to plaintiff. Under Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, the weight to b given such "stray remarks" is slight in any event. The "stray remark" thus is relatively unimportant, and the proffered evidence immaterial, even if we attribute the most negative possible innuendo to the remark, as plaintiff requests.

Mere "stray remarks" cannot demonstrate pretext or discriminatory animus (*Horn v. Cushman & Wakefield Western, Inc.*, supra, 72 Cal.App.4th 798 at p. 809.) Stray remarks are insufficient to establish discrimination. (Id. At p. 810; see also *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1160; Smith v. Firestone Tire & Rubber Co. (7th Cir. 1989) 875 F.2d 1325, 1330 ["remarks, . . . when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria,

even when such statements are made by the decision-maker in issue."])

Although it is true that plaintiff was not seeking to admit the hearsay statement, "don't ask, don't tell" for the truth of the matter allegedly asserted, and it may have had some slight degree of relevance, on review of the entire record, the exclusion of this evidence did not result in a manifest "miscarriage of justice." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331 [appellant's burden to establish "a clear case of abuse" and "a miscarriage of justice"].) For reversal to be ordered, plaintiff must demonstrate actual prejudice from the exclusion of the evidence. (*Hernandez v. Paicius* (2003) 103 Cal.App.4th 452, 456.)

Because of the consistent testimony from Mr. Marks concerning plaintiff's serious deficiencies in work performance before he left on medical leave, it is unlikely that the inclusion of this evidence would have altered the outcome of the trial. Substantial evidence supports the jury's apparent determination of problems in plaintiff's job performance, and thus its specific finding that plaintiff was not discharged in substantial part due to his disability.

Plaintiff's counsel's offer of proof was vague as to how Mr. Marks could have "engineered" the making of this

remark by Mr. McClain; thus the necessary nexus between the "stray remark" and the evidentiary foundation within plaintiff's case that would mandate its admittance was lacking. Plaintiff's opposition to the motion in limine simply concludes that the perception that plaintiff had a "serious contagious disease" was "fostered by . . . manager Kenneth Marks." Plaintiff also failed to show any link between the excluded "stray remark" testimony and the shunning behavior in which he alleged that the co-workers engaged, partly because he was unable to establish that any co-workers shunned him or avoided him. The court, in any event, never prohibited evidence of shunning conduct. It simply excluded evidence of the "stray remark."

Evidence Code Section 352 gave the trial court broad discretion to determine whether the evidence in question would cause undue prejudice, confusion, or possibly mislead the jury, or whether such concerns outweighed the probative value. Defendant's concern that the jury could have been inordinately focused on a collateral issue – a hearsay remark addressed to a group of workers by someone without hiring or firing authority over plaintiff – was reasonable here, as was the court's decision to exclude the evidence.

It was plaintiff's burden to establish a clear case of abuse and a miscarriage of justice. (*Burns v. 20th Century Insurance Co.* (1992) 9 Cal.App.4th 1666, 1675.) Plaintiff has failed to meet his burden. Nor is it reasonably probable that a result more favorable to plaintiff would have been reached if the proffered evidence of the "stray remark" had been admitted. (D. at pp. 1675-1676, citing Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1069.)

Alleged Abuse of Discretion for Failure to Investigate Juror Incompetence

On appeal, plaintiff asserts that the trial court abused its discretion in failing to investigate the competence of the juror mentioned in the jury's note, quoted above, who purportedly was having difficulty participating in deliberations at the outset of the process on Friday afternoon. As indicated above, the jury expressed no further difficulties to the court regarding the deliberations process after returning on Monday. Counsel for both parties knew of the contents of the note sent by the court to the jury before it was sent. Both sides acquiesced in the sending of this note.

There had been a thorough voir dire before the jurors were seated. Plaintiff had an opportunity to observe their

comprehension of English and did not challenge any juror on that basis. We do not know who the allegedly impaired juror was, how he voted, and thus cannot assume that there was prejudice to plaintiff from these events. Further, the record suggests that whatever difficulties the jury may have encountered in the beginning were resolved during the course of the day's deliberations on Monday, October 17, 2003, as the jury sent no further notes.

"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct – like the ultimate decision to retain or discharge a juror – rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case." (*People v. Ray* (1996) 13 Cal.4th 313, 343 [52 Cal.Rptr.2d 296, 914 P.2d 846].) The record does not reveal that the court had any information of this type." (*People v. Osband* (1996) 13 Cal.4th 622, 675-676.)

In this case, similarly, the record does not reveal that the court had any actual information, which, if proven to be true, would continue "good cause" to doubt a juror's ability to perform his duties and justify his removal from the case. A juror's inability to perform his or her functions "must appear in the record as a 'demonstrable reality' and bias ay not be presumed." (*People v. Beeler* (1995) 9 Cal.4th 953, 975)

Plaintiff did not move to excuse the juror in question (who was never identified), did not seek to ask further questions to identify the juror, and did not object in any way on the record to the trial court's note back to the jury. Plaintiff failed to protest in any manner so that the trial court might have corrected or avoided any error. Plaintiff did not request any investigation of the qualifications of this particular juror. No party requested that an alternate be seated. Deliberations had barely begun and an alternate was available. "'An appellate court will not consider procedural defects or erroneous rulings where an objection could have been, but was not, raised in the court below.' [Citation.] It is unfair to the trial judge and to the adverse party to take advantage of an alleged error on appeal where it could easily have been corrected at trial. [Citations]" (*Children's*

Hospital & Medical Center v. Bonta (2002) 97 Cal.App.4th 740, 776-777; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn.1.) The trial court's communication with the jury was done with the full knowledge and consent of both counsel. Any error was therefore forfeited.

No Cumulative Error

Having found no error, there is no cumulative error.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

BY THE COURT:
[SEAL]

MOSK, J.

We Concur:

ARMSTRONG, Acting P.J.

KRIEGLER, J.

APPENDIX C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 5

DATE: August 10, 2005

Robert L. Risley
Attorney at Law
790 E. Colorado Blvd.
9th Floor
Pasadena, CA 91101-2113

Vaughn Bruenn
v.
Northrop-Grumman Corporation, et al.

B172740
Los Angeles County No. BC280576

THE COURT:

Appellant's petition for rehearing is denied.

APPENDIX D

FILED
LOS ANGELES SUPERIOR COURT
OCT 17 2003
JOHN A. CLARKE, CLERK
BY S. WONG, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Vazgn Bouenn
PLAINTIFF(S)
vs.
Northrop / Grumman
DEFENDANT(S)

CASE NUMBER
BC280576

the jury in the above entitled action, request the following:

One of our jurors while understanding the testimony, is finding it difficult to understand the liberations. English is his second language. We all feel this may jeopardize our deliberations. He says he needs a translator

The Court has no ability to provide a translator. It is too early to determine that proper deliberations cannot take place. Perhaps jury should recess and come back fresh on Monday.

This 17 day of Oct 19 2002

Foreman

Department 31

BEST AVAILABLE COPY

APPENDIX E

AEROJET
SOST TRAINER'S RECORD
Direct Employer Contract

Trainer No: SOST Trainer: MARKS, KEN
(Print last name, first name)

Location of Training: 1100 West Hollyvale Street, Azusa, CA 91702

Type of Training: Module 3.1 Office Automation

***List of Approved Trainer Activities**: (a) making specific SOST assignments, (b) interacting/coaching and continuous evaluation and feedback on trainee performance, (c) and assessing trainee's competencies. **Note: Travel time may not be included as an approved activity.**

Curriculum Number: #126 Office Automation (PC Training) Trainee Employee Number: E09878
(For Contractor's Use Only)

Date	Trainee's Name (Print last name, first name)	*Trainer Activity (use legend letter) (A, B, C)	Time Spent with Individual (in minutes)
12/15/00	BRUENN, VAUGHN	B	60
12/21/00	BRUENN, VAUGHN	B	60
		Total for Page in Minutes:	
		TOTAL SOST Trainer Hours:	2

As the SOST trainer for the trainees listed, I hereby certify that they have participated in the SOST as indicated above and only approved trainer activities were performed.

Signature of Trainer K E Marks Date 12/21/00

ETP/SOST1A (2/98) (AERO43B) (F132,MIN=120,H=2)

DEE0106

Page: 1 of 1
CG# ET00-0102
Job # _____

APPENDIX E

AEROJET
SOST TRAINER'S RECORD
Direct Employer Contract

Trainer No: SOST Trainer: MARKS, KEN
(Print last name, first name)

Location of Training: 1100 West Hollyvale Street, Azusa, CA 91702

Type of Training: Module 3.1 Office Automation

***List of Approved Trainer Activities**: (a) making specific SOST assignments, (b) interacting/coaching and continuous evaluation and feedback on trainee performance, (c) and assessing trainee's competencies. **Note: Travel time may not be included as an approved activity.**

Curriculum Number: #126 Office Automation (PC Training) Trainee Employee Number: E09878
(For Contractor's Use Only)

Date	Trainee's Name (Print last name, first name)	*Trainer Activity (use legend letter) (A, B, C)	Time Spent with Individual (in minutes)
12/4/00	BRUENN, VAUGHN	B	60
12/6/00	BRUENN, VAUGHN	B	60
		Total for Page in Minutes:	
		TOTAL SOST Trainer Hours:	2

As the SOST trainer for the trainees listed, I hereby certify that they have participated in the SOST as indicated above and only approved trainer activities were performed.

Signature of Trainer K E Marks Date 12/6/00

ETP/SOST1A (2/98) (AERO43B) (F132,MIN=120,H=2)

No. 05-901

FILED
FEB 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

VAUGHN BRUENN,

Petitioner,

v.

NORTHROP GRUMMAN CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Northrop Grumman Corporation does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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I.

INTRODUCTION

Defendant/Respondent Northrop Grumman Corporation ("Northrop") submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Plaintiff/Petitioner Vaughn H. Bruenn. Petitioner asserts that the Court should review the decision of a Court of Appeal of the State of California, on the alleged ground that the state trial court abridged his right to a jury trial pursuant to the Seventh Amendment of the United States Constitution and a provision of the California Constitution. Petitioner further requests that the Court review a decision to exclude evidence, allegedly in violation of the California Evidence Code.

Petitioner's claims fail on the merits, and rely, in part, on a misstatement of the record.

II.

STATEMENT OF THE CASE

Petitioner Vaughn H. Bruenn filed a lawsuit in the Superior Court for the State of California against Respondent Northrop and Kenneth Marks, a Northrop Manager, alleging a cause of action arising from violation of California's Fair Employment and Housing Act. Mr. Marks was later dismissed from the case.

Trial in the action commenced on October 6, 2003 with the parties engaging in extensive voir dire of prospective jurors. After the close of the evidence, the jury rendered a verdict in favor of Northrop on October 20, 2003.

Deliberations by the jury began on October 17, 2003 (a Friday) and the jury, shortly after deliberations began, delivered a note to the trial court. Contrary to Petitioner's statement of facts, trial counsel were present when the note was sent and when the trial court responded to it. All trial counsel were shown the court's note from the jury and the court's response before it was submitted back to the jury. The note from the jury stated: "One of our jurors, while understanding the testimony, is finding it difficult to understand the liberations [sic]. English is his second language. We all feel this may jeopardize our deliberations. He says he needs a translator."

The trial court responded: "The Court has no ability to provide a translator. It is too early to determine that proper deliberations can't take place. Perhaps jury should recess and come back fresh on Monday."

There were no further communications between the jury and the trial court on the subject of the October 17, 2003 note prior to the return of the verdict by the jury on Monday, October 20, 2003. At 2:30 p.m. on Monday, the jury reached a verdict, responding to questions on a special verdict form.

At the trial court, Petitioner never moved to ask further questions to identify the juror who allegedly had the difficulties, did not move to excuse the juror in question, and did not object in any way on the record to the trial court's note back to the jury. Petitioner never requested that an alternate juror be seated. Deliberations had just begun and an alternate was available. In short, Petitioner failed to address the issue to which he now objects so that the trial court might have corrected or avoided any alleged error.

Petitioner appealed the Judgment to the state Court of Appeal of the State of California which affirmed the Judgment. The State Court of Appeal held that there was no alleged abuse of discretion for failure to investigate any alleged juror incompetence. The Court of Appeal noted that there had been a thorough voir dire before the jurors were seated and no one challenged any juror on the basis of a lack of comprehension of English. The State Court of Appeal further noted that the record suggested that whatever difficulties that the jury may have encountered in the beginning of the deliberations were resolved when the jury came back on Monday, as the jury sent no further notes.

The State Court of Appeal held that the record did not reveal any actual information, which, if proven to be true, would constitute "good cause" to doubt the juror's ability to perform his duties. Additionally, the Court noted that Petitioner failed to request any relief at the trial court level and thus any alleged error was forfeited. The State Court of Appeal did not decide any issue of federal law.

Petitioner then filed a Petition for Review with the California Supreme Court. The Petition was denied.

III.

REASONS FOR DENYING THE PETITION

The state court decision did not decide any important question of federal law as the state court never addressed a federal law question. Additionally, Petitioner's alleged constitutional basis under the Seventh Amendment for this Petition is without merit, as the Seventh Amendment does not apply to state court civil proceedings. Finally,

Petitioner failed to object at the trial court level and thus waived his right to appeal the issue of juror competence.

1. The State Courts Never Decided Any Federal Question of Law.

The unpublished written opinion of the California Court of Appeal never addressed a federal question. The opinion cited only state court decisions.

As no federal question was decided in the state proceedings, this Petition should be denied. Supreme Court Rule 10.

2. The Seventh Amendment Does Not Apply To Civil Cases In State Court.

Petitioner is requesting that this Court review a decision involving jury proceedings in a state court, in an action alleging state law violations.

The Seventh Amendment to the United States Constitution has been held not to apply to civil cases in state court. *Elliott v. City of Wheatridge*, 49 F.3d 1458, 1459 (10th Cir. 1995); [citing to *Eilenbecker v. District Court of Plymouth County*, 134 U.S. 31 (1890)]; *GTFM, LLC v. TKN Sales, Inc.*, 257 F.3d 235, 240 (2nd Cir. 2001). As explained in *Hawkins v. Aid Association for Lutherans*, 338 F.3d 801, 808, *cert. denied*, 540 U.S. 1149, 124 S.Ct. 1146 (7th Cir. 2003), there is no constitutional right to a civil jury trial outside of an Article III forum.

3. Petitioner Lacks Standing To Object To The Issue Of Juror Competence And His Alleged Constitutional Violation.

Petitioner's counsel, aware of the juror note and the trial court's proposed response, never objected to the procedure. The attorneys never asked for further questioning of the juror nor did they seek to excuse the juror who may have been having some difficulty with the deliberations. The failure to object or to seek relief at the trial court precludes appellate review of this issue.

Respectfully submitted,

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